

SERVICE DATE - MARCH 11, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD CO.–CONSTRUCTION  
AND OPERATION–WESTERN ALIGNMENT

Decided: March 10, 2003

By petition filed January 17, 2003, in this sub-numbered proceeding (Tongue River III), the Tongue River Railroad Company (TRRC or Railroad) seeks permission to file supplemental evidence to update the record concerning the transportation aspects of this case.<sup>1</sup> TRRC also asks the Board to establish a procedural schedule for the filing of responses to the updated evidence. We will allow TRRC to file its updated information. We will establish a procedural schedule after TRRC has filed its evidence and we have had an opportunity to review it and determine adequate time limits for replies.

BACKGROUND

In 1996, the Board approved TRRC's application to build a 41-mile line of railroad between Ashland and Decker, MT.<sup>2</sup> The line would connect with an 85-mile line between Miles City and Ashland that TRRC was previously authorized to construct, but has not yet built.<sup>3</sup> Together, this

---

<sup>1</sup> The supplemental information TRRC seeks to submit will not address any of the environmental issues raised in this proceeding. Those matters will be considered separately in the environmental review process, which will be conducted concurrently by the Board's Section of Environmental Analysis (SEA). SEA intends to reinstitute shortly the environmental review process by publishing an appropriate notice in the Federal Register.

<sup>2</sup> See Tongue River Railroad Company–Rail Construction and Operation–Ashland to Decker, Montana, Finance Docket No. 30186 (Sub-No. 2) (STB served Nov. 8, 1996) (Tongue River II). That decision is currently on appeal before the U.S. Court of Appeals for the 9th Circuit (Northern Plains Resource Council, Inc., et al. v. Surface Transportation Board, No. 97-70037 (9th Cir. filed Jan. 7, 1997)). Judicial review is being held in abeyance pending resolution of the Tongue River III application.

<sup>3</sup> See Tongue River R.R.–Rail Construction and Operation–In Custer, Powder River and Rosebud Counties, MT, Finance Docket No. 30186 (ICC served Sept. 4, 1985, modified May 9,

(continued...)

130-mile line would provide a new, shorter route than is currently available to transport coal from the Montana Powder River Basin to eastern destinations.

In the Tongue River II proceeding, the Board approved construction of a routing for the southernmost portion of the Ashland to Decker line—the Four Mile Creek Alternative. The instant proceeding involves a 17.3-mile alternate routing to the previously-approved Four Mile Creek Alternative.

The Board adopted a procedural schedule for filing comments and replies on the transportation aspects of the application in Tongue River III in a decision served June 23, 1998. The Board also stated that it would not rule on whether TRRC's Western Alignment met the transportation-related criteria of 49 U.S.C. 10901 until after the environmental review process was completed. Numerous parties filed comments, and TRRC filed a reply on November 2, 1998. This completed the evidentiary record on the transportation-related aspects of the application.

In the environmental review process, SEA, on July 10, 1998, issued a notice of intent to prepare a supplemental environmental impact statement (SEIS) to address the proposed new routing. A final scoping notice, published in the Federal Register on February 3, 1999, specified that the SEIS would evaluate the Western Alignment in full, as well as refinements to the alignments previously considered in Tongue River I and Tongue River II, where there have been significantly changed circumstances indicating that what was done before is no longer adequate. Before SEA could complete a Draft SEIS, however, TRRC asked SEA, on March 2, 2000, to suspend its environmental work. That request triggered a two and one-half year hiatus in any action on the Tongue River III application. On December 19, 2002, TRRC advised SEA that it was now in a position to move forward and asked SEA to resume its environmental review of the application.

On January 17, 2003, TRRC filed the instant petition seeking to update its previously submitted evidence. TRRC maintains that, if granted, it would ensure that the Board has before it the most current evidence available when it reaches its decision on the transportation-related aspects of the case. TRRC also asks the Board to establish adequate time periods for replies to its updated pleadings, and, if necessary, to permit it to respond. TRRC stresses that the updated information it would submit would be minimal, and identifies five general areas it would address.<sup>4</sup>

---

<sup>3</sup>(...continued)  
1986) (Tongue River I).

<sup>4</sup> TRRC states that it may be appropriate to update the record in the following five areas: (1) the transfer of the Otter Creek Tracts 1, 2, and 3 to the State of Montana; (2) tonnage forecasts,  
(continued...)

The Northern Plains Resource Council, Inc. (Northern Plains), by itself, and the United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board (UTU-GCA/MT), jointly, filed replies in opposition on February 6, 2003. On February 13, 2003, TRRC filed a motion asking the Board to accept TRRC's attached responses to the Northern Plains and UTU-GCA/MT replies. On February 20, 2003, Native Action, Inc. (Native Action) late-filed a reply to TRRC's petition. Finally, on February 24, 2003, UTU-GCA/MT filed a reply to TRRC's response.

### PRELIMINARY MATTERS

We will grant TRRC's February 13 motion and accept its attached response. Although our rules prohibit a "reply to a reply," we will grant TRRC's motion to file one because the filing helps provide a complete record, clarifies arguments, will not prejudice any party and, under the circumstances of this case, cannot be said to unduly prolong the proceeding. We will also accept UTU-GCA/MT's February 24 reply. Finally, we will accept Native Action's reply although it failed to meet the 20-day filing deadline for replies set forth in 49 CFR 1104.13(a). No party has objected to this late-filed pleading, and our acceptance of it will not prejudice any party.

### DISCUSSION AND CONCLUSIONS

TRRC asks the Board to permit it to file supplemental evidence to update the record, arguing that we should allow it to file this updated information because we need the most current evidence available upon which to base our decisions. Petitioner explains that the evidence will be modest in scope and that the proceeding will not be delayed if the Board accepts it. Finally, TRRC states that, to

---

<sup>4</sup>(...continued)

financial forecasts, and estimated construction costs; (3) TRRC's business structure, proposed financial structure, and plan for raising the funds required for construction; (4) supporting statements from Montana officials; and (5) the effects, if any, of the Board's recent approval of the Dakota, Minnesota, and Eastern Railroad's proposed construction of a rail line to serve the southern Powder River Basin in Wyoming. See Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Jan. 30, 2002), appeal filed, Mid States Coalition for Progress, et al., v. Surface Transportation Board, No. 02-1359 et al. (8th Cir. filed Feb. 7, 2002). Under 49 U.S.C. 10901, the Board must issue a certificate authorizing rail construction if the proposed line will not be inconsistent with public convenience and necessity. The transportation issues that are raised in rail entry cases include: (1) whether the applicant is fit, financially and otherwise, to undertake the construction and provide rail service; (2) whether there is a public demand or need for the service; and (3) whether the competition would be harmful to existing carriers. The five areas that TRRC proposes to address relate to these issues.

avoid prejudice to any opponents, the Board should establish a schedule to provide parties an opportunity to examine the evidence and comment upon it.<sup>5</sup>

The parties in opposition to TRRC's petition raise two principal objections. First, they argue generally that TRRC's petition is flawed because there is no specific statutory authority or Board precedent that allows parties to supplement the record in a pending proceeding. Second, they maintain that TRRC will somehow improperly use its supplemental information to buttress its original arguments and evidence or take advantage of the environmental review process to add transportation-related evidence to the record, while not allowing the opposition an adequate opportunity for rebuttal. They assert that TRRC should have to file a new application rather than update the current record.

More specifically, Northern Plains<sup>6</sup> and UTU-GCA/MT attack TRRC's reliance on 49 CFR 1117.1 as a basis for submitting a petition seeking permission to file supplemental evidence. UTU-GCA/MT also argues that TRRC's attempt to provide supplemental evidence should be "guided" by the Board's procedures for a petition to reopen a decision (49 CFR 1115.4) or a petition for reconsideration (49 CFR 1115.3), and, in any event, that TRRC should have attached the supplemental information to its pleading. Lastly, both NPRC and UTU-GCA/MT urge that at a minimum the Board provide adequate notice to the public of the recommencement of Tongue River III and update the service list through a notice in the Federal Register.

We are not persuaded by these arguments with regard to the use of 49 CFR 1117.1 here. TRRC is merely seeking our approval to supplement the record with updated information. Its use of 49 CFR 1117.1 (which specifically applies to petitions for relief not otherwise provided for) to do so is clearly permissible. Section 1117.1 is a "catch all" provision that provides parties with a way to ask the Board to exercise its discretion to remedy unusual situations. In this regard, there is no reason to attempt, as UTU-GCA/MT suggests, to somehow apply the standards here that we normally use in determining petitions for reconsideration or reopening. We similarly find that the provisions UTU-GCA/MT says should guide us are inapplicable because they implicate different concerns, i.e., those dealing with safeguards for administrative finality, whereas this is a pending proceeding. Finally, we find the opponents' other arguments unavailing. It is within our discretion to allow the filing of updated

---

<sup>5</sup> In its reply statement, TRRC notes that it did not initially propose any specific schedule for replies or responsive evidence, and that it would not oppose deferring any Board consideration of the specifics of such a schedule until after the Board has had the opportunity to review the updated information.

<sup>6</sup> Although Native Action filed a separate pleading, its arguments generally echo those previously made by Northern Plains. Accordingly, we will not separately address its arguments.

evidence that more accurately reflects the current situation with regard to transportation issues, and we will do so at this time.<sup>7</sup>

TRRC has requested our permission to update the record as to a pending matter, and has described the evidence it proposes to update. We do not believe that TRRC's filing represents an improper attempt to augment its previously filed evidence. Given that almost 5 years have passed since TRRC filed its application in this proceeding, it is appropriate to allow the Railroad to supplement the information it previously submitted with up-to-date information that more accurately reflects the current situation to assure that we have a complete record when we address the transportation aspects of Tongue River III.<sup>8</sup>

Because of the potential impact of the updated information TRRC will submit, the lengthy period of time during which this case was held in abeyance, and the age (and possible obsolescence) of the service list, notice of the recommenced proceeding will be published in the Federal Register. This will provide notice that work on Tongue River III has resumed, afford all interested parties an opportunity to come forward and present any relevant arguments with regard to the updated evidence, and also ensure that, to the extent possible, the service list accurately reflects the correct addresses<sup>9</sup> of all parties interested in this matter.

Despite claims by the opponents, there is no indication that TRRC is attempting to short-circuit the opponents' opportunity to submit replies and rebuttal evidence. To the contrary, it has expressed its desire to cooperate in affording adequate time for any interested party to comment on the updated information, and states that it is amenable to the postponement of the establishment of a procedural schedule for the transportation-related aspects of this case until we have received and evaluated all of its updated evidence. After we receive TRRC's updated information, we will establish a procedural schedule adequate to assuage the concerns about the filing of responsive evidence expressed by the opponents here.

---

<sup>7</sup> UTU-GCA/MT also argues that the Board should postpone announcing its ruling as to accepting the supplemental evidence until TRRC has filed it. UTU-GCA/MT has not presented any valid reason to delay our decision here until receipt of the updated information.

<sup>8</sup> In addition to the information the Railroad intends to present, we expect that TRRC will provide further insight as to its relationship, if any, with The Burlington Northern and Santa Fe Railway Company, with which the proposed line connects and whose cooperation is an issue that is relevant to the feasibility of the proposed operation.

<sup>9</sup> UTU-GCA/MT noted that numerous copies of its initial pleading here that were addressed to parties of record were returned undelivered.

Finally, although we believe that updated information is necessary here, we will not require TRRC to file a new application. A new application would provide nothing that cannot be provided in a supplement to the current application (with Federal Register notice and an opportunity for all interested parties to respond). Accordingly, we will allow TRRC to update its evidence instead of requiring that a new application be filed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TRRC's petition for leave to reply to the NPRC and UTU-GCA/MT replies is granted.
2. Native Action's late-filed reply and UTU-GCA/MT's reply to TRRC's petition for leave to file replies to replies are accepted.
3. TRRC's petition for leave to file supplemental evidence is granted.
4. Notice of the action taken here will be published in the Federal Register.
5. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams  
Secretary